State of New York
STATE BOARD OF ELECTIONS

Neil Kelleher
Chair
Douglas A. Kellner
Chair
Helena Moses Donohue
Commissioner
Evelyn J. Aquila
Commissioner

40 STEUBEN STREET
ALBANY, N.Y. 12207
Phone: 518/474-6367 Fax: 518/486-4546
website: www.elections.state.ny.us

Peter S. Kosinski
Executive Director
Stanley L. Zalen
Executive Director
Todd D. Valentine
Special Counsel
Patricia L. Murray
Deputy Counsel

January 5, 2007

Hon. Richard J. Holwell
Unites States District Court
Southern District of New York
U.S. Courthouse, 500 Pearl Street
New York, New York 10007-1312

ATT: Court Clerk

RE: *Murawski v. Pataki, et al.*
Index No. **06-CV-12965** (RJH)

Dear Court Clerk:

Enclosed please find Defendant New York State Board of Elections' Motion to Dismiss and Supporting Papers in the above entitled action.

Sincerely,

Patricia L. Murray (PM 1196)
Deputy Counsel

PLM/mer

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. **06-CV-12965** (RJH)

WILLIAM E. MURAWSKI,

-Plaintiff,

-against-

GEORGE PATAKI, Individually and as GOVERNOR OF THE STATE OF NEW YORK; RUDOLPH GUILIANI, individually and as former MAYOR OF THE CITY OF NEW YORK; ELIOT SPITZER, individually and as ATTORNEY GENERAL OF THE STATE OF NEW YORK; MICHAEL BLOOMBERG, personally and as MAYOR OF THE CITY OF NEW YORK; NEW YORK STATE BOARD OF ELECTIONS; NEW YORK CITY BOARD OF ELECTIONS; IAC/INTERACTIVE CORP, RONALD M. GUNZBURGER, YAHOO! INC, and all their successors; and the Jane Does and John Does whose names will become known through the process of discovery,

-Defendants

NOTICE TO PRO SE LITIGANT OPPOSING MOTION TO DISMISS

PLEASE TAKE NOTICE, that upon defendant New York State Board of Elections' (hereinafter "State Board") statement pursuant to Local Civil Rule 12.1, the Declaration of Patricia L. Murray, dated January 5, 2007, and the exhibits annexed thereto, and defendant State Board's memorandum of law, and upon all prior pleadings and proceedings, defendant State Board will move this Court, before the Honorable Richard J. Holwell, at the United States Courthouse for the Southern District of New York, located at 500 Pearl Street, New York, New York, on a date and time to be determined by the Court, for an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure granting a motion to dismiss in favor of defendant State Board, and for such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Rule 6.2 of the Local Civil Rules of the United States District Court for the Southern and Eastern Districts of New York, defendant State Board, by their attorney, Patricia L. Murray, Deputy Counsel to the New York State Board of Elections, hereby notifies the plaintiff that:

1. Defendant has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This means that the defendant has asked the Court to decide this case without a trial, based upon written materials, including affidavits, submitted in support of their motion. The claims you assert in your complaint may be dismissed without a trial if you do not respond to this motion by filing your own sworn affidavits or other papers as required by Rule 56(e). An affidavit is a sworn statement of fact based on personal knowledge that would be admissible at trial. For your convenience, the full text of Rule 56 is annexed hereto as Exhibit A.

2. In short, Rule 56 provides that you may NOT oppose summary judgment simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statements, or documents, countering the facts asserted by the defendant and raising issues of fact for trial. Any witness statements, which may include your own statements, must be submitted in the form of affidavits. You may submit affidavits that were prepared specifically in response to defendant's motion for summary judgment.

3. Any issue of fact that you wish to raise in opposition to defendant's motion for summary judgment must be supported by affidavit or by other documentary evidence contradicting the facts asserted by the defendant. If you do not respond to defendant's motion for summary judgment on time with affidavits or documentary evidence contradicting the facts asserted by the defendant, the Court may accept defendant's factual assertions as true. Judgment may then be entered in defendant's favor without trial.

4. If you have any questions regarding these matters, you may direct them to the Pro Se Office.

DATED: January 5, 2007
Albany, New York

PATRICIA L. MURRAY (PM-1196)
Deputy Counsel, New York State Board of Elections
Attorney for Defendant State Board of Elections
40 Steuben Street, Albany, New York 12207
Tel: (518) 474-6367, Fax: (518) 486-4546

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. **06-CV-12965** (RJH)

WILLIAM E. MURAWSKI,

-Plaintiff,

-against-

GEORGE PATAKI, Individually and as GOVERNOR OF THE STATE OF NEW YORK; RUDOLPH GUILIANI, individually and as former MAYOR OF THE CITY OF NEW YORK; ELIOT SPITZER, individually and as ATTORNEY GENERAL OF THE STATE OF NEW YORK; MICHAEL BLOOMBERG, personally and as MAYOR OF THE CITY OF NEW YORK; NEW YORK STATE BOARD OF ELECTIONS; NEW YORK CITY BOARD OF ELECTIONS; IAC/INTERACTIVE CORP, RONALD M. GUNZBURGER, YAHOO! INC, and all their successors; and the Jane Does and John Does whose names will become known through the process of discovery,

-Defendants

DECLARATION IN SUPPORT OF DEFENDANT NEW YORK STATE BOARD OF ELECTIONS' MOTION TO DISMISS

Patricia L. Murray, attorney for Defendant New York State Board of Elections, under penalty of perjury, makes the following declaration in support of defendant State Board's motion to dismiss.

1. That she is Deputy Counsel for the New York State Board of Elections, (hereinafter "State Board"), and is authorized to represent the State Board in this matter.

2. That plaintiff herein timely submitted a petition purporting to name himself and Donald Winkfield as candidate for New York State Governor and Lieutenant Governor, respectively, for the independent body called Voice of the People Party.

3. That the cover sheets of the petition contain a signed statement by plaintiff that the petition does not contain the requisite number of signatures to be valid under New York State Election Law. (See Exhibit A).

4. That defendant State Board, upon a public vote of its Commissioners, found the petition to be invalid, and plaintiff was duly notified of the action. (See Amended Complaint, ¶49 and Exhibit 12).

5. That the procedure followed by the State Board in this instance was in strict adherence to the provisions of New York State Election Law.

6. That plaintiff had the right and opportunity to challenge the decision action of the State Board, as provided for in state statute, but failed to do so.

7. That the consequences of plaintiff's failure to follow state statutory procedures cannot be ameliorated via a federal action.

WHEREFORE, defendant State Board moves this Court to dismiss this action for failure to state a claim upon which relief can be based.

DATED: January 5, 2007
Albany, New York

PATRICIA L. MURRAY (PM-1196)
Deputy Counsel, New York State Board of Elections
Attorney for Defendant State Board of Elections
40 Steuben Street, Albany, New York 12207
Tel: (518) 474-6367, Fax: (518) 486-4546

Exhibit A

[redacted]

VOICE OF THE PEOPLE PARTY

Name of Candidate	Public Office	Place of Residence
William E. Murawski	Governor	530 West 50th Street, New York NY 10019

Total number of volumes in petition: One volume containing 110 sheets.

Identification Number: ____________________

The petition does not contain the number of signatures required by the Election Law of the State of New York. However, a precedent was set in 1999 when Alan Keyes "piggybacked" as an intervener to McCain v Molinary (1999 civ 8447) thereby resulting in Alan Keyes being placed on the ballot without submitting one signature. Therefore, William E. Murawski must be placed on the ballot.

Contact Person to Correct Deficiencies: William E. Murawski
530 West 50th Street
New York, NY 10019
(212) 246-7811

I hereby authorize that notice of any determination made by the Board of Elections be transmitted to the person named above.

Candidate William E. Murawski — 8/22/06 Date

VOICE OF THE PEOPLE PARTY

Name of Candidate	Public Office	Place of Residence
Donald Winkfield	Lieutenant Governor	92-03 214th Street Queens Village, NY 11428

Total number of volumes in petition: One volume containing 110 sheets.

Identification Number: ____________

The petition does not contain the number of signatures required by the Election Law of the State of New York. However, a precedent was set in 1999 when Alan Keyes "piggybacked" as an intervener to McCain v Molinary (1999 civ 8447) thereby resulting in Alan Keyes being placed on the ballot without submitting one signature. Therefore, Donald Winkfield must be placed on the ballot.

Contact Person to Correct Deficiencies: William E. Murawski
530 West 50th Street
New York, NY 10019
(212) 246-7811

I hereby authorize that notice of any determination made by the Board of Elections be transmitted to the person named above.

Donald Winkfield William E. Murawski 8/22/06

Candidate Donald Winkfield Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. **06-CV-12965** (RJH)

WILLIAM E. MURAWSKI,

-Plaintiff,

-against-

GEORGE PATAKI, Individually and as GOVERNOR OF THE STATE OF NEW YORK; RUDOLPH GUILIANI, individually and as former MAYOR OF THE CITY OF NEW YORK; ELIOT SPITZER, individually and as ATTORNEY GENERAL OF THE STATE OF NEW YORK; MICHAEL BLOOMBERG, personally and as MAYOR OF THE CITY OF NEW YORK; NEW YORK STATE BOARD OF ELECTIONS; NEW YORK CITY BOARD OF ELECTIONS; IAC/INTERACTIVE CORP, RONALD M. GUNZBURGER, YAHOO! INC, and all their successors; and the Jane Does and John Does whose names will become known through the process of discovery,

-Defendants

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NEW YORK STATE BOARD OF ELECTIONS' MOTION TO DISMISS

PATRICIA L. MURRAY (PM-1196)
Deputy Counsel, New York State Board of Elections
Attorney for Defendant State Board of Elections
40 Steuben Street, Albany, New York 12207
Tel: (518) 474-6367, Fax: (518) 486-4546

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Statement of the Case

Plaintiff originally brought this action November 6, 2006, against the New York State Board of Elections and the New York City Board of Elections, seeking an injunction to prevent the election scheduled for November 7, 2006, alleging *inter alia*, that defendant State Board had "ignored precedent" by refusing to place his name on the ballot as a gubernatorial candidate, despite the fact that he acknowledged that his petition did not meet the statutory signature requirements. The injunctive relief was denied.

Plaintiff then amended his compliant, adding several public and private defendants, and several causes of action which, collectively, appear to allege constitutionally impermissible interference with the plaintiff's campaigns for a variety of public offices over the past several years. Plaintiff's prayer for relief against defendant New York State Board of Elections asks for a declaration that the entire New York State electoral process is unconstitutional and for monetary damages for negligent violation of his constitutional rights.

Argument

POINT I

PLAINTIFF'S FAILURE TO FOLLOW THE STATUTORY PROCEDURE FOR JUDICIAL CHALLENGE TO ACTIONS OF THE STATE BOARD PRECLUDES HIM FROM BRINGING THIS ACTION

a. New York State Statute Provides Requisite Due Process

Election Law §16-102(2) provides that judicial proceedings to validate or invalidate a petition must be brought no later than fourteen days after the last day to file the petition; except that a proceeding to validate may be brought within three business days of a board's decision to invalidate, even though the fourteen days has already elapsed. These time frames are absolute and may not be extended. *Dyte v. Lawley*, 20 Misc. 2d 988 (1959), 190 N.Y.S. 2d 253; *Garrow v. May*, 54 A.D. 2d 781 (3rd Dept. 1976), 387 N.Y.S. 2d 490; *Thompson v. New York State Board of Elections*, 54 A.D. 2d 531 (3rd Dept. 1976), 386 N.Y.S. 2d 715, *aff'd* 40 N.Y. 2d 814; *Breitenstein v. Turco*, 254 A.D. 2d 566 (3rd Dept. 1998), 679 N.Y.S. 2d 162; *in re. Sinigano*, 196 Misc. 2d 831 (2003), 766 N.Y.S. 2d 786.

Under the process provided in Election Law §16-102(2), plaintiff had until September 11, 2006, to being judicial proceedings to challenge the State Board's determination of invalidity; he failed to do so.

b. Plaintiff's Failure to Exercise his Right Cannot be Interpreted as a Violation of his Rights by the New York State Board of Elections.

The Due Process claims of the Fourteenth Amendment requires the provision of an opportunity to be heard either prior or subsequent to a deprivation of constitutionally protected rights. The ballot access scheme provided for the by the New York State Election Law, gives plaintiff ample opportunity to be heard.

In this situation, plaintiff received written notice of the Board's determination of invalidity of his petition. Indeed, plaintiff, in submitting his petitions, acknowledged that he had not met the statutory signature requirements for his petition to be valid. Plaintiff also had sufficient time to bring a court action challenging the State Board's determination. In that proceeding, plaintiff could have raised any and all issues relating to the validity of his petition; he would not have been limited to the issue of insufficiency of signatures which was the basis of the State Board's determination. Election Law §§ 16-100; 16-102; see also *Smith v. Marchi*, 143 A.D. 2d 325 (2nd Dept. 1988), 532 N.Y.S. 2d at 389; *Maxwell v. Hill*, 225 A.D. 2d 947 (2nd Dept. 1996), 640 N.Y.S. 2d 280; *Matter of Edelstein v. Suffolk County Board of Elections*, Slip Op. 7801 (2nd Dept. 2006).

The Second Circuit has held that the opportunity to be heard provided by New York State Election Law meets the due process requirements of the Fourteenth Amendment by providing meaningful opportunity for a party to challenge the state's action. *Rivera-Powell v. New York City Board of Elections*, U.S. App. LEXIS 29860 (2nd Cir. 2006). In footnote 9 of that case, the court refers back to its holding in *Giglio v. Dunn*, 732 F. 2d 1133, 1135 (2nd Cir. 1984), which held that a person is "not deprived of due process simply because he failed to avail himself of the opportunity." Plaintiff's decision to forgo the due process available to him under the state statute cannot now be used to provide an otherwise nonexistent basis for an allegation of due process deprivation. To allow plaintiff to go forward would undermine the Second Circuit holding "that federal intervention in garden variety election disputes is inappropriate." *Rivera-Powell* at 17, citing *Shannon v. Jacobowitz*, 394 F. 3d 90 (2005) (internal quotations omitted).

POINT II

THE HOLDING IN THE *Molinari v. Powers* CASE IS CONFINED TO THE SPECIFIC FACTS OF THAT CASE, AND IS NOT A PRECEDENT FOR THE INSTANT MATTER.

In *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000), there was a constitutional challenge to the ballot access requirements for delegates and alternate delegates to the Republican National Convention. The primary to select national convention delegates is held in March, [Election Law §8-100(1)] and petitions circulated during January and February. As part of the decision in *Molinari*, the parties stipulated to the unconstitutionality of the requirements under the specific circumstances surrounding the mid-winter petitioning process. *Molinari v. Powers*, at 79.

Alan Keyes, who had not attempted to garner delegates in New York State, intervened in the action. As a result, he was able to take advantage of the holding, which put on the Republican primary ballot delegates and alternates for all candidates who had national name recognition. The *Molinari* holding did not apply to delegate and alternate delegate candidates for the Democratic National Convention, whose petitioning period and primary were identical to the Republican Party's. nor has that holding been applied in any other ballot access challenge since 2000. The statute which established the challenged ballot access scheme was repealed December 31, 2000.

Plaintiff's situation in the instant matter does not in any way resemble the circumstances underlying the *Molinari* decision. He may not use that very narrow decision to nullify his failure to meet the constitutional statutory ballot access requirements of Election Law §6-136 (see *Prestia v. O'Connor*, 178 F. 3d 86 (2nd Cir. 1999), *certiorari denied* 120 S. Ct. 539, 528 U.S. 1025.

POINT III

NEW YORK STATE HAS DESIGNATED THE NEW YORK STATE COURT OF CLAIMS AS THE FORUM FOR THE ADJUDICATION OF CLAIMS FOR MONEY DAMAGES AGAINST THE STATE.

New York State Constitution, Article 6, Section 9, in relevant part, provides: "The court [of claims] shall have jurisdiction to hear and determine claims against the state . . ." To the extent that plaintiff seeks monetary damages against defendant State Board, this Court is the wrong venue, and action for damages must be brought in the New York State Court of Claims.

Conclusion

For all of the foregoing reasons the New York State Board of Elections defendants respectfully request that this Court dismiss this action.

DATED: January 5, 2007
Albany, New York

PATRICIA L. MURRAY, ESQ. (PM 1196)
Deputy Counsel
Attorney for Defendants
New York State Board of Elections
40 Steuben Street, Albany, NY 12207
Tel: (518) 474-6367 / Fax: (518) 486-4546

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. **06-CV-12965** (RJH)

WILLIAM E. MURAWSKI,

-Plaintiff,

-against-

GEORGE PATAKI, Individually and as GOVERNOR OF THE STATE OF NEW YORK; RUDOLPH GUILIANI, individually and as former MAYOR OF THE CITY OF NEW YORK; ELIOT SPITZER, individually and as ATTORNEY GENERAL OF THE STATE OF NEW YORK; MICHAEL BLOOMBERG, personally and as MAYOR OF THE CITY OF NEW YORK; NEW YORK STATE BOARD OF ELECTIONS; NEW YORK CITY BOARD OF ELECTIONS; IAC/INTERACTIVE CORP, RONALD M. GUNZBURGER, YAHOO! INC, and all their successors; and the Jane Does and John Does whose names will become known through the process of discovery,

-Defendants

AFFIDAVIT OF SERVICE

STATE OF NEW YORK | ss.:
COUNTY OF ALBANY |

MARYELLEN REDA, being duly sworn, deposes and says that:

1. I am over the age of eighteen years and not a party to this action.

2. On January 5, 2007, I served a copy of the attached Motion to Dismiss and Supporting Papers, on behalf of Defendant New York State Board of Elections, upon the following participants in the proceedings:

WILLIAM E. MURAWSKI, *Pro Se* Plaintiff
530 East 50th Street #5A, New York, NY 10019

HON. GEORGE PATAKI, New York State Governor
Executive Chamber, The Capitol, Albany, NY 12224

CHLARENS ORSLAND, ESQ.
Counsel for Defendants Bloomberg, Giuliani, New York City Board of Elections
New York City Law Dept, 100 Church Street, New York, NY 10007

HON. ELIOT SPITZER, New York State Attorney General
Department of Law, 120 Broadway, New York, NY 10271

IAC / INTER ACTIVE CORP.
152 West 57th Street, 42nd Floor, New York, NY 10019

RONALD M. GUNZBURGER
409 N.E. 17th Avenue, Ft. Lauderdale, FL 33301

YAHOO! INC.
721 First Avenue, Sunnyvale, CA 94089

3. Service was effected by delivered a true copy of the papers to the parties by Overnight Mail via United Parcel Service, by depositing said papers in a sealed envelope and personally delivering to a representative of the United Parcel Service at 40 Steuben Street, Albany, New York, on January 5, 2007, at 4:00.

MARYELLEN REDA

Sworn to before me January 5, 2007

NOTARY PUBLIC

Comm. Expires: PATRICIA L. MURRAY
Notary Public, State of New York
No 4992101
Qualified in Schenectady County
Commission expires 4-24-2010

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